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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

MATHEW ALEXANDER ENGLISH,

Defendant and Appellant.

D051422

(Super. Ct. No. SCD199330)

APPEAL from a judgment of the Superior Court of San Diego County, Howard H. Shore, Judge. Affirmed.

Matthew Alexander English was found guilty of eight counts of robbery. As to each count, it was found true he used a firearm within the meaning of Penal Code,<sup>1</sup> section 12022.53, subdivision (b). In addition, appellant admitted prior convictions within the meaning of sections 667.5, subdivision (b), and 667, subdivisions (b)-(i). English was sentenced to a prison term of 54 years four months. He appeals, arguing the

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<sup>1</sup> All further statutory references are to the Penal Code unless otherwise specified.

trial court erred when it refused to grant a continuance. He argues the continuances were necessitated by his trial day change from self-representation to representation by counsel and during trial to investigate a new defense.

## FACTS

### *A. Prosecution Case*

In the course of one week, appellant committed eight armed robberies. As to each robbery, he was positively identified as the perpetrator. In some of the robberies, appellant was taped by a surveillance camera as he committed the crimes. Appellant has a distinctive tattoo on his hand, and several of the victims identified the robber as having that tattoo. At one of the places robbed, appellant filled out a credit application using his own name. When arrested, appellant was in possession of a gun identified as used in the robberies and some of the stolen property.

### *B. Defense Case*

Against the advice of counsel, appellant testified. He stated he experiences blackouts and has no recollection of events during those times. He admitted it was his image on the surveillance tapes but stated he had no memory of robbing the stores. He stated he was in possession of the property reported as stolen but claimed he assumed the property was his. He did recall going to several of the places where the robberies occurred but did not remember committing the crimes.

## DISCUSSION

Three months before trial, appellant, asserting his right under *Faretta v. California* (1975) 422 U.S. 806 [95 S.Ct. 2525], waived his right to counsel and represented himself.

After the sheriff's department revoked appellant's jailhouse in propria persona (pro per) privileges, the trial court appointed counsel to assist him. The parties dispute the status of that attorney. Appellant argues he was merely advisory counsel. The Attorney General asserts the attorney was appointed as standby counsel charged, if necessary, with taking over the defense without a continuance of trial.

Based on his interpretation of appointed counsel's status, appellant argues the trial court erred when, on the day of trial, after appellant no longer wished to represent himself, it denied defense counsel's request for a continuance. Appellant argues the denial violated section 1049 which requires that after the entry of a plea a defendant be given at least five days to prepare for trial and, more fundamentally, that the failure to grant a continuance denied him his right to counsel. Appellant additionally argues the trial court had no statutory authority to appoint standby counsel.

Appellant also argues the trial court erred when it denied mid-trial a defense request for a continuance to prepare a psychiatric defense consistent with appellant's testimony that he suffers blackouts and had no memory of the charged offenses.

#### *A. Trial Day Request for Continuance*

##### *1. Background*

##### *a. Complaint, Appointment of Counsel, Continuances*

The complaint was filed on May 31, 2006.

Appellant was represented by deputy public defender Katherine Braner at least as early as June 12, 2006.

After appellant requested and the trial court granted two continuances, the matter was set for preliminary hearing on July 27, 2006.

On July 27, 2006, appellant waived his right to a preliminary hearing and stipulated to a bind over for trial. Appellant waived time and the matter was set for trial on December 18, 2006.

On October 31, 2006, at appellant's request the trial date was continued to February 15, 2007.

*b. Motions for Substitution of Counsel, Self-Representation*

On February 15, 2007, it was the expectation of the court and parties that appellant, as part of a plea bargain, would change his plea to guilty. However, when the parties appeared in the trial department, appellant stated he wanted to represent himself. The prosecutor indicated he was not ready to go to trial because he had called off his witnesses.

The parties returned to the presiding department, and appellant explained to Judge Fraser he believed the energies of his attorney were directed too much at securing a plea bargain. Appellant stated he did not know what investigation was conducted by his attorney and that he had not seen a psychological evaluation. Appellant seemed less concerned with trying the case himself than with personally investigating the case. Appellant, who apparently did not think he had a defense, stated he wanted to see if there were any "loopholes." The trial court asked appellant to discuss the matter further with counsel. The trial date was continued to February 21, 2007.

On February 21, 2007, appellant again asked to represent himself. Judge Fraser, noting that appellant faced a prison term of over 58 years, suggested that self-representation might not be a wise decision. When asked why he wanted to represent himself, appellant stated he wanted to properly evaluate his case. The trial court asked if there was anything it could do to change appellant's mind. Appellant responded the court could give him a new lawyer. Appellant explained that his attorney was not giving him information concerning his case and seemed only interested in making a deal with the prosecutor.

Interpreting appellant's remarks as a request for the substitution of counsel, the trial court cleared the courtroom and conducted a *Marsden* hearing.<sup>2</sup> After the hearing, the court denied appellant's motion for new counsel.

When the prosecutor reentered the courtroom, the trial court stated it was up to appellant to decide if he wished to represent himself. Appellant stated he wanted to proceed in pro per. The court asked if appellant understood he would be going to trial in two to three weeks and the court would grant no further continuances. Appellant stated he so understood. Appellant was granted pro per status. A defense investigator and runner were appointed and the matter was set for trial on March 14, 2007.

*c. Further Continuances*

On May 6, 2007, appellant requested and Judge Thompson granted a 30-day continuance to April 18, 2007.

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<sup>2</sup> *People v. Marsden* (1970) 2 Cal.3d 118.

On April 18, 2007, the matter was assigned to Judge Shore for trial. The prosecutor informed the court that appellant was having disciplinary problems in the jail. Charges were pending against him for possessing alcohol, and he was under investigation for possession of stabbing instruments in his cell. The prosecutor stated that because of those incidents, it was likely appellant's jailhouse pro per privileges would be revoked. The prosecutor asked that the public defender be reappointed at least as advisory counsel.

Appellant was not ready to go to trial. He complained he did not have time to review the lengthy videotapes of the various robberies. Appellant stated his investigator was interviewing witnesses but he had not had time to speak to him. Appellant stated he was not a disciplinary problem, something was found in his cell but he was unaware of its presence. Appellant explained he was not prepared to go to trial because he had been in the "hole," for a couple of weeks for things he claimed he had not done. Appellant was confident the sheriff would not revoke his jailhouse pro per privileges.

In response to the prosecutor's request that advisory counsel be appointed, the court stated advisory counsel's role was to assist the defendant in presenting his case and such counsel could only be appointed at the defendant's request. The court noted standby counsel's role was not to assist the defendant in presenting his defense but to be ready to take over the case if necessary. The court stated appellant had not requested advisory counsel, and if counsel were appointed to take over, the defense a continuance would be necessary.

The court stated that a defendant's right to represent himself could be revoked based on a number of things, including misconduct outside the courtroom that affected

the integrity of the process. The court stated there was no basis for revoking appellant's pro per status at that point. The court stated if the sheriff withdrew appellant's jailhouse pro per privileges, the court was required to allow him to reconsider whether he wanted to be represented by counsel.

Appellant stated that while his confinement in the "hole" had resulted in his inability to prepare his defense, he still wished to defend himself. The trial court continued the matter to April 23, 2007, to determine appellant's disciplinary status and to determine whether it was possible for the trial to go forward at that time.

On April 23, 2007, the prosecutor reported appellant was placed in disciplinary confinement on March 15, 2007, because of the discovery of jail-made knives in his cell. On April 13, 2007, another search of appellant's cell revealed a jail-made knife in one of appellant's legal pads. Appellant was again placed in disciplinary confinement where he remained. During his period in disciplinary confinement, appellant's jailhouse pro per privileges were suspended. The prosecutor stated he was told by the sheriff's department that an administrative hearing would be held concerning the revocation of those privileges.

The trial court conducted an in camera hearing with appellant and his investigator. It appears based on the comments of the trial court, a transcript of the in camera hearing is not part of the record, that the investigator had not yet contacted the witnesses. The court continued the matter for a status hearing on April 27, 2007, concerning appellant's disciplinary situation and the preparation of the defense case. The trial court indicated that at the status hearing it might appoint standby counsel.

d. *Appointment of Advisory/Standby Counsel, Continuance*

On April 27, 2007, the court indicated it was informed by the sheriff's department that after an administrative hearing appellant's jailhouse pro per privileges were revoked. Appellant's investigator reported he arranged for interviews with witnesses and spoke to some of them. The investigator told the court it would take from one to six weeks to finish the interviews.

The court stated it was informed by the public defender's office that it did not provide standby counsel. The court stated it then contacted the administrator who dealt with private conflict counsel and was told that for insurance reasons they also did not provide standby counsel. However, private conflict counsel could be appointed as advisory counsel with the understanding that if the need arose, counsel would take over representation of a defendant. With that semantic understanding, the court appointed Eric Cox as appellant's advisory/standby counsel.

The trial court asked appellant if, in light of the loss of his pro per privileges but with the help of advisory counsel, he still wished to represent himself. After consultation with Cox, appellant waived his right to self-representation. However, when the court indicated its intention to reappoint deputy public defender Braner or another public defender, appellant changed his mind and again asserted his right to self-representation.

Appellant agreed to accept Cox as advisory counsel. The court stated Cox would serve both as advisory and standby counsel. The court stated if for any reason it had to revoke appellant's pro per status, Cox could immediately step in and with no further



continuances would take over representation. Cox stated he understood. The court told Cox to familiarize himself with the case as soon as possible.

The court set the matter for trial on May 29, 2007, and stated there would be no further continuances.

*e. Trial*

On May 29, 2007, appellant informed the court he was not ready to go to trial. He told the court his investigator had not been able to contact all the witnesses. The trial court spoke to the investigator by telephone and was told the investigation was essentially complete and that he would have reports for appellant either that evening or the next morning.

Appellant also stated that when he decided to continue representing himself after his jailhouse pro per privileges were withdrawn, he was not aware of how fully his privileges would be curtailed. He had not had a chance to prepare for trial. The trial court explained appellant's jailhouse pro per privileges had been properly revoked and there was nothing the court could do.

When the court stated it would proceed with jury selection and that the defense case would not begin for about a week, appellant stated he no longer wished to represent himself. The court appointed Cox to represent appellant. When the court asked for comments, Cox informed the court that he had seen none of the investigative reports. Presumably, Cox meant the reports being prepared by the defense investigator. Cox stated he had reviewed the videotapes of the various robberies but indicated the

investigators' reports might lead to the need for further investigation. Cox asked the matter be put over for a day or two.

The court stated it would be flexible with regard to scheduling as trial progressed but that jury selection was going to proceed. The court stated if Cox needed delays during trial, he could request them.

The prosecution began presenting evidence on May 30, 2007, and completed its case at the end of the day on May 31, 2007.

## *2. Discussion*

Appellant makes three arguments related to the denial of Cox's request for a continuance on the date of trial. First, he argues the denial violated his statutory right to at least five days to prepare his defense after the entry of his plea. (See § 1049.) Next, he argues the trial court had no power to appoint standby counsel. Finally, appellant argues the failure to grant Cox a continuance denied him due process.

We begin by considering appellant's assertion that Cox was appointed merely to advise appellant and not also as standby counsel. Standby counsel is an attorney appointed for the benefit of the court whose responsibility it is to represent the defendant if that should become necessary, for example, if the defendant's pro per status is revoked. Advisory counsel is appointed to assist the self-represented defendant if and when the defendant requests help. (*People v. Blair* (2005) 36 Cal.4th 686, 725.)

When Cox entered the case on April 27, 2007, the trial court made clear and Cox agreed that he was being appointed as both advisory and *standby* counsel. Cox was told to be prepared to take over representation of appellant immediately if necessary. Cox

agreed to do so.<sup>3</sup> In light of the unequivocal record, it is difficult to understand appellant's argument both in his brief and at oral argument that Cox was appointed merely as advisory counsel.

With that understanding of Cox's status, appellant's claim that requiring him to represent appellant on the day of trial without a continuance violated the requirements of section 1049 evaporates. Section 1049 states: "After his plea, the defendant is entitled to at least five days to prepare for trial." We first note that the public defender and then appellant, when acting in pro per, had lengthy periods after appellant's plea to prepare a defense. Cox, after accepting standby counsel status on April 27, 2007, had until the trial date of May 29, 2007, to prepare for trial, a period far in excess of the five days required by section 1049.

Next, we address appellant's claim the trial court had no authority to appoint standby counsel. Citing cases dealing with Government Code section 27706, which states the duties of the public defender, appellant argues that because serving as standby counsel is not listed as a duty in that section, a trial court lacks authority to appoint private conflict counsel to serve as standby counsel.

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<sup>3</sup> After an extended discussion of the law related to advisory and standby counsel, the trial court summed up by saying: "All right. Now, I think I've said everything I want to stay [sic] with regard to the case law. But just keep in mind that Mr. Cox, although I've appointed him as advisory counsel, will also function -- from a functional standpoint -- to be standby counsel, as well; in that, for some reason if I have to revoke your pro per status, he will substitute in and be attorney of record without any further continuances; do you understand that?"

Mr. Cox replied that he did.

The court then granted a month's continuance, stating: "I will ask Mr. Cox to get up to speed as quickly as possible with regard to the nature of the case."

A split of authority exists concerning the power of a trial court under Government Code section 27706 to appoint a public defender as standby counsel. (Compare, e.g., *Brookner v. Superior Court* (1998) 64 Cal.App.4th 1390, 1393, with *Littlefield v. Superior Court* (1993) 18 Cal.App.4th 856, 860.) The issue is irrelevant to the present case. First, the trial court appointed private conflict counsel, not a public defender, as standby counsel. More fundamentally, whatever the administrative complexities in appointing standby counsel, appellant has no interest in them. No harm is done appellant by any arguable violation of Government Code section 27706 in the appointment of standby counsel. Appellant's sole legitimate concern is whether he is afforded effective representation.<sup>4</sup>

Finally, we address appellant's claim he was denied due process when the trial court refused Cox's trial day request for a continuance. It is the policy of this state that trial be heard at the earliest possible time and that continuances be granted only for good cause. (§ 1050.) The decision to grant a continuance rests within the sound discretion of the trial court. A party challenging the denial of a request for a continuance must establish an abuse of discretion. An order denying a continuance is seldom successfully attacked. (*People v. Beames* (2007) 40 Cal.4th 907, 920.)

On the day of trial, Cox, as standby counsel, was appointed to represent appellant. Cox told the trial court he had not seen the new investigative reports and asked that trial be continued for a day or two. Moments before, the trial court had talked to the defense

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<sup>4</sup> In light of the above, appellant's lengthy discussion of *People v. Davis* (1987) 189 Cal.App.3d 1177 is irrelevant.

investigator and learned that his report would be ready that afternoon or the next morning. Cox told the court he had reviewed the videotapes of the various robberies and had gone through the discovery provided by the prosecution. Cox stated, however, that the new investigative reports might lead to the need for further investigation. Because Cox did not claim to the contrary, we conclude that, honoring his earlier commitment to the court, he was otherwise ready to take over the case and proceed to trial.

Moreover, in denying the request for a continuance, the court stated it would be flexible with regard to scheduling but that jury selection would commence. The court told Cox that if time was needed by the defense during trial, he could request it.

The trial court did not abuse its discretion in denying Cox's request for a continuance on the day of trial. Cox voiced no reason for a continuance except that the new investigative reports might reveal the need for additional investigation. Given the status of the case, it was reasonable for the trial court to proceed with jury selection and to deal with any request for a continuance based on the new investigative reports when and if that need actually arose. It did not.

#### *B. Request for Mid-Trial Continuance/Mistrial*

Appellant argues the trial court abused its discretion when at the conclusion of the prosecution case it denied his request for a continuance or a mistrial to allow the investigation of a mental defense.

##### *1. Background*

The prosecution began presenting evidence on May 30, 2007, and completed its case at the end of the day on May 31, 2007.

On the morning of June 1, 2007, Cox stated to the court that during the time appellant represented himself, no thought was given to a psychological defense and no psychological testing of appellant was done. Cox related, however, that appellant now claimed to have no memory of any of the charged robberies. Cox told the court that during the time he served as advisory counsel, appellant never asked him to pursue any type of psychological defense.

Cox stated appellant now believed he was suffering from some sort of multiple personality disorder. Cox noted no investigation of such a disorder had been undertaken. Cox stated appellant wanted him to investigate possible defenses related to his altered mental state or lack of memory. Cox told the court he understood that given appellant's tardy revelation of his claimed mental disorder, it was unlikely the court would grant a continuance to investigate the matter. Cox stated, nonetheless, it was appellant's intention to testify concerning his lack of memory. Cox stated that while he believed it unlikely the court would allow such testimony, it was necessary he seek a ruling on the matter. Counsel stated he had little time to think about the matter but had concerns a defense could be formulated around appellant's claim of mental disorder.

The court replied it could not prohibit appellant from testifying. Counsel stated: "I don't know that he would be allowed to get into those areas, if the court is willing to let him discuss his mental state . . . ." The court stated it would not allow appellant to diagnose himself but appellant could certainly testify he had no memory of the robberies. Cox stated he was not asking for more time to conduct a psychological examination of appellant. Cox stated such an investigation would take months and should have been

done before the matter was in trial. Cox stated, however, appellant was personally requesting a continuance or a mistrial so that the psychological questions could be explored.

The court denied any request for additional time or for a mistrial.

Cox stated it was his advice to appellant that he not testify.

Appellant testified that while the surveillance tapes showed he committed the charged robberies, he had no memory of committing them. Appellant stated he had a history of blackouts.

## *2. Discussion*

It is difficult to determine whether Cox was actually requesting a continuance/mistrial. Cox was in a difficult position. After taking over the case, the decision concerning what defenses to present was his. (*People v. Horton* (1991) 54 Cal.3d 82, 90.) Cox clearly and understandably did not want to present a bizarre claim of multiple personality disorders or some form of unconsciousness evidenced by appellant's claim of memory loss. The problem was that while Cox got to "call most of the shots," it was solely up to appellant to decide whether to testify. If appellant wanted to testify against the advice of counsel and admit that he physically committed the crimes but had no memory of them, Cox could do nothing to stop him. (See *People v. Nakahara* (2003) 30 Cal.4th 705, 717.)

In any event, the decision to grant a continuance or a mistrial is within the discretion of the trial court. (*People v. Beames, supra*, 40 Cal.4th at p. 920

[continuance]; *People v. Lewis and Oliver* (2006) 39 Cal.4th 970, 1029 [mistrial].) We find no abuse here.

Especially under the particular circumstances of this case, a party seeking a continuance to allow further investigation must demonstrate that the continuance would be useful. To demonstrate the usefulness of a continuance, a party must show both the materiality and relevance of the evidence necessitating the continuance and that such evidence can be obtained within a reasonable time. (*People v. Beeler* (1995) 9 Cal.4th 953, 1003.)

In this case, Cox stated it would require a lengthy period to investigate appellant's claims. The presentation to the court of what appellant believed was his disorder and how it would affect the case was less than complete or informative and provided no basis for believing useful evidence could be discovered. (See *People v. Beeler, supra*, 9 Cal.4th at p. 1003.)

In order to show the court abused its discretion in denying a continuance in the midst of trial, the defendant must also demonstrate diligence in the investigation of the matter. (See *People v. Lewis and Oliver, supra*, 39 Cal.4th at p. 2006.) Cox did not even



assert that the defense had acted with diligence in investigating what appears to be appellant's mid-trial claim of a mental disorder.<sup>5</sup>

The trial court acted properly in denying the request for a mid-trial continuance.

The judgment is affirmed.

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BENKE, Acting P. J.

WE CONCUR:

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NARES, J.

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O'ROURKE, J.

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<sup>5</sup> In support of his position that the trial court abused its discretion in denying him a mid-trial continuance appellant cites *Hughes v. Superior Court* (1980) 106 Cal.App.3d 1, 3-6, claiming that it is "strikingly similar" to the present case. In fact, it is not similar at all. In *Hughes* the defendant's attorney stated on the day of trial he could not proceed. He explained that because of matters out of his control he had inadequate time to prepare and going forward would result in his client receiving ineffective assistance. The Court of Appeal found that counsel had been diligent in preparing the case and essentially concluded there was an adequate basis for a continuance. Those are not the facts of this case. Cox did not claim he could not proceed. No showing was made the defense had been diligent in pursuing a mental defense. The most reasonable conclusion is that Cox did not want a continuance.